In the Supreme Court of Pennsylvania.

WILLIAM E. DODGE *et al.* vs. JOHN N. BACHE.

An agent's liability to his principal for negligence by which a third person has been injured, is only contingent, while it is direct and certain to the party injured.

An action against the principal by the party injured is *res inter alios acta* as to the agent, and the record is not admissible in evidence against him, except as to the amount of damages.

Therefore the rule that excludes an agent from testifying for his principal in such an action, is not founded in clear reason, and should not be extended; and his testimony should not be rejected, except upon the quantum of damages, unless his liability over has been clearly proved.

Bache, plaintiff below, was the owner of a parcel of saw-logs lying in Pine Creek, a navigable stream and public highway, about four miles below Marsh Creek Pond. This pond was also on a navigable stream and public highway, and was kept up by Dodge & Co., plaintiffs in error, for the purpose of running the saw-mill thereto attached, and also for the purpose of a harbor for saw-logs. It was so constructed that about eight feet of head could be let off at once, thereby making a flood in the creek below. These logs were put into the creek for the purpose of being floated to a mill about one mile below. McDougall was the agent of Dodge & Co., and had the general supervision of their business about this mill and pond, and had notice that these logs were in the creek below, and liable to be washed away by a flood from this pond. He took no precautions to guard against it, but let the pond off without any notice to Bache, and washed the logs away. Thereupon Bache brought his action on the case against Dodge & Co. for the negligence of their agent McDougall.

On the trial defendants offered the deposition of McDougall, the agent, showing that the act complained of was not done by him. To this offer plaintiff objected on the ground of interest in the witness, and the court sustained the objection. This is the point assigned as error in this cause.

Pierce and *Wilson*, for plaintiffs in error.—The deposition of McDougall was rejected upon the ground that he was interested in the event of the cause. A recovery against the defendants below would not necessarily have entitled them to a recovery against him. To exclude his testimony the plaintiff must make out a case for the defendants against him: *McCredy* vs. *The Schuylkill Navigation Co.*, 3 Whart. 441; *Smith* vs. *Seward*, 3 Barr 342.

Henry Sherwood, for defendant in error.—The deposition of McDougall went directly to throw the responsibility off the shoulders of the witness and put it on to others, and thus relieve himself of all responsibility to his principals, the defendants below. For this purpose he is not a competent witness: 1 Stark. Ev. 149; 1 Greenl. Ev. 540, § 417; *McDowell* vs. *Simpson*, 3 Watts 135; *Juniata Bank* vs. *Beale*, 1 W. & S. 229; *Plumer* vs. *Alexander*, 2 Jones 81; *Dorance* vs. *Commonwealth*, 1 Harris 160, 165; *Schuylkill Co.* vs. *Harris*, 5 W. & S. 28; *Orphans' Court* vs. *Woodburn*, 7 Id. 166; *Gilpin* vs. *Howell*, 5 Barr 51.

The witness was not released. He was not a competent witness until he was. The declaration charges the negligence of the witness while acting as the agent of the plaintiffs in error. That negligence was the gist of the action; the evidence sustained the declaration.

The opinion of the Court was delivered by

STRONG, J.—The rule which excludes an agent from testifying for his principal, in actions brought against the principal for alleged negligence of the agent, though recognised in many cases, is not founded in clear reason. He is held generally incompetent, because, in the event of a recovery against his principal, he would be liable over, and the judgment recovered would be admissible in evidence against him. His liability to his principal is, however, but contingent, while it is direct and certain to the party injured by his negligence. Satisfaction recovered from his principal exonerates him from this certain liability, and leaves his responsibility over still only contingent. But it is said the judgment

against the principal is admissible in an action which he may bring against the agent. Why it should be, it is hard to see. The agent is not a party to it nor a privy. He had no right to conduct the defence, to call witnesses, or to interfere in any manner between his principal and the party injured. Why then should he be affected by a record that is wholly *res inter alios?* Yet such a judgment is undoubtedly held to be evidence against him, not evidence to establish his liability, but admissible to show the quantum of damages. His liability must be shown by other proof. The questions whether he was negligent, and whether the injury for which satisfaction was recovered from the principal, was a consequence of his negligence, remain open, and are not solved in any degree by the record. Notwithstanding, then, a recovery against the principal, it may be that the agent is not responsible over to him, and at most it would seem his testimony for the principal should be rejected only when offered to reduce the estimate of damages.

Based upon reasons so unsatisfactory, this rule of exclusion should not be extended. The testimony of the agent should not be rejected unless his liability over has been clearly proved. It is not to be assumed by the court. The general presumption is that every witness is competent, and it is incumbent upon the party who objects to him to show a clear disqualification.

In such a case as this, he must show not only that the act complained of was negligence, but that it was unmistakeably done by the witness whom he seeks to exclude. Until this has been shown, no interest, certain or contingent, is made out.

Turning now to the case in hand, it appears to have been an action to recover damages for an injury alleged to have been caused by the negligence of the defendants. The act complained of was opening their dam at Marsh Creek Mill, thereby causing a flood in the stream which carried away the logs of the plaintiff. The main questions were whether the dam was opened at the time when the logs were lost, and, if it was, by whom it was opened. Two counts in the plaintiff's declaration aver that it was done by McDougall, an agent of the defendants. On the trial, after the

evidence of the plaintiff had been submitted, the defendants offered the deposition of McDougall, to show that the water in the dam was not opened by him, but the court rejected the deposition on the ground that the witness was interested. This was assuming that he was liable over to the defendants in case of a recovery by the plaintiff. But how did that appear? Clearly he was not, if he did not open the dam, even though it may have been opened by others. The fact that he was an agent is nothing, if he was not an active agent in the act complained of. The averments in the declaration amount to no proof of his agency. If they did, it would often be in the power of a party, at his own pleasure, to exclude the most important witnesses of his adversary by simply averring an agency. And in examining the testimony submitted by the plaintiff, we find no evidence that the dam was opened by McDougall, or in pursuance of his orders. There is hardly any evidence that it was opened at all, at the time when the plaintiff's logs floated away. Certainly there is nothing to sustain an averment that the witness would be responsible to the defendants, if the plaintiff should recover. In rejecting the deposition, an interest in the witness was assumed without proof, assuredly without such clear proof as the law requires to justify setting aside a witness as incompetent. There was error, therefore, in rejecting the deposition.

And the error was the more palpable when the deposition was offered in connection with evidence that McDougall had been directed by his principals to open the pond and let off the water *whenever there should be water enough* to float logs to a lower mill. Such a direction tended to show that he would not be liable to his employers even if he did open the dam, and therefore raised a presumption against the existence of any interest.

Judgment reversed, and a *venire de novo* awarded.